

that P11 was only recorded on January 13, though he was arrested on January 8, 1976 and that accused had been called as a witness but had not given evidence in accordance with P11 at the P.E. at which Maanas was the accused after accused himself had been charged under the I.S.A. now become very significant and I am no longer satisfied beyond reasonable doubt that P11 was voluntarily made by accused. The contents of P11 are therefore no longer relevant and as such no weight can be given to them.

I accordingly acquit and discharge accused on both the charges.

Acquitted and discharged.

Solicitors: *R.K. Menon & Co.*

LAU EE EE v. TANG KING KWONG

[O.C.J. (Chong Yik Liong J.) November 22, 23 & December 21, 1983]

[Sibu - Civil Suit No. 2 of 1978]

Tort - Road accident - Negligence - Full liability admitted - Assessment of damages.

Damages - Multiple injuries - Pain and suffering - Loss of amenities - General damages - Assessment.

In this case, the plaintiff, aged 19 at the time of accident, claimed against the defendant damages for personal injuries and loss suffered by her as a result of a road accident on August 25, 1976 when a car driven by the defendant collided with her and knocked her down while she was standing on the grass verge of the road. The defendant admitted full liability for negligence and the sum of \$92.00 for special damages. The only question for determination is on the quantum of general damages for pain and suffering and loss of amenities. The plaintiff sustained the following injuries:

- (1) fracture shaft of left humerus;
- (2) scalp laceration;
- (3) fractures of transverse processes and compression fractures of 3rd and 4th lumbar vertebrae;
- (4) fracture of the right mandible; and
- (5) intraperitoneal bleeding from arterial bleeding in a liver laceration.

She was hospitalised for 40 days, from August 25, 1976 to October 4, 1976, and she underwent outpatient treatment periodically on 17 occasions over a period of 3½ months.

Held, allowing the plaintiff's claim: (1) the total sum of \$25,000 as damages with interest at 6% p.a. from date of service of writ to date of judgment, and costs, under the following heads:

- (a) scalp laceration - \$500.

- A (b) fracture of left humerus - \$4,000.
- (c) fractures of transverse processes and compression fractures of 3rd and 4th lumbar vertebrae - \$18,000.
- (d) fracture of right mandible - \$6,000.
- (e) liver laceration - \$5,000.

From the above total sum of \$33,500, a sum of \$8,500 was deducted for overlapping, giving a net figure of \$25,000;

- B (2) a sum of \$92 was awarded as special damages with interest at 3% p.a. from date of accident to judgment;
- (3) general and special damages will carry statutory interest at 8% p.a. from date of judgment to date of payment.

C Cases referred to:

- (1) *Zainah binte Abdullah & Ors. v. Lim Liang Hook* [1975] 2 M.L.J. iii.
- (2) *Lau Kiu Kwong v. Government of Malaysia & Anor* - Sibu Civil Suit No. 39 of 1978 (Unreported).
- D (3) *Hassan bin Mat Saman v. Tengku Mat @ Engku Mat bin Engku Mik & 3rd Party - Dass on Quantum in Accident Claims*, Vol. 2 p. 97.
- (4) *Hamzah bin Abdul Ghani v. Verghese Thomas* [1981] 2 M.L.J. 329.
- (5) *Appandurai @ Raju s/o Varthan v. Lim Puk Tow - Dass on Quantum in Accident Claims*, Vol. 1 p. 402.
- E (6) *M. Alagappan s/o Muthuraman v. The Government of the Republic of Singapore* [1967] 1 M.L.J. x1.
- (7) *Yasin bin Wahab v. Loo Kok Wai* [1980] 2 M.L.J. 43.
- (8) *Muslim bin Arip v. Gue Kee Peng* [1975] 1 M.L.J. xlv; *Dass on Quantum in Accident Claims*, Vol. 2 p. 312.
- F (9) *Siew Choo Foo v. Lee Peng Lay & Anor.* [1981] 2 M.L.J. 336.

CIVIL SUIT.

Ting Sing Chuan for the plaintiff.

G *George Lim* for the defendant.

Cur. Adv. Vult.

Chong Yik Liong J. : This is an action for damages for personal injuries and loss suffered by the plaintiff as a result of a road accident which took place at Queensway, Sibu on August 25, 1976 when a motor car S4827 driven by the defendant collided with the plaintiff and knocked her down while she was standing on the grass verge of the said road.

I At the commencement of the hearing, the defendant admits full liability for negligence for the accident, and also admits the plaintiff's claim for special damages amounting to \$92.00. The only question which the Court has to determine is on the quantum of general damages for pain and

suffering and loss of amenities.

Immediately after the road accident on August 25, 1976 plaintiff was admitted to Lau King Howe Hospital, Sibü, where she was treated by Dr. Chong Guan Chock (P.W.2). She sustained the following injuries:

- (1) Fracture shaft of left humerus.
- (2) Scalp laceration.
- (3) Fractures of transverse processes and compression fractures of 3rd and 4th lumbar vertebrae.
- (4) Fracture of the right mandible.
- (5) Intraperitoneal bleeding from arterial bleeding in a liver laceration.

These injuries are substantially stated in the medical report of Dr. Chong dated January 22, 1977 (Exh. A2), except for the location of the mandibular fracture which is stated to be on the left side. Dr. Chong attributed this discrepancy to a typing error. Having regard to his evidence on the result of subsequent X-ray examination, I accept his explanation and that the fracture of the mandible was on the right side, and not on the left side as stated in his medical report. In any event, Miss Phang for the defendant does not seriously dispute the injuries described above as having been sustained by the plaintiff, and she in effect asks the Court to assess general damages on the basis of these injuries, without regard to the evidence of other injuries which Mr. Ting for the plaintiff has sought to include, and which I shall refer to and deal with later.

The history relating to medical treatment for these injuries and the progress thereof appears to be somewhat vague. Dr. Chong was only able to tell us that the plaintiff was found on admission to have evidence of intraperitoneal bleeding, that a laparotomy was performed and an artery was found bleeding from a liver laceration and that this was sutured. The doctor, however, could say no more for the other injuries, owing to the fact that the medical records of the plaintiff had been discarded by the hospital. According to the evidence of the plaintiff, she had blood-transfusion in which four pints of blood was used; the scalp laceration (which she referred to as the head injury) was stitched up; her fractured left arm was put under plaster from the top of the upper arm to the middle of the lower arm, and she had an operation on the stomach, obviously referring to the laparotomy performed by Dr. Chong on account of the intraperitoneal bleeding. There was, however, no

A mention of how the mandibular and lumbar injuries were treated. Before I proceed any further with this subject, I think it pertinent that I should, at this stage, mention and dispose of certain matters introduced in the evidence of the plaintiff. The plaintiff added two more injuries in addition to those described above. She said that she had injury on her hip and her right leg was injured, and that her right leg was plastered with cement from the hip to the ankle. In the absence of medical evidence, I place little reliance on her evidence as to these two additional injuries, and besides, they are not even pleaded in the pleadings. Under the circumstances, I have to disregard her evidence with regard to the two additional injuries as being wholly irrelevant for the purpose of the present proceedings.

D I shall now resume from where I have left off. The plaintiff was hospitalised for a period of 40 days from August 25, 1976 until October 4, 1976 when she was discharged from the hospital. According to the plaintiff, the plaster on her left arm had been removed before her discharge from hospital, and at the time of her discharge, she felt no strength and no sensation in her right leg; she could not walk unassisted, and her left arm was bandaged and supported by a sling. After discharge, she had, as she was asked, to go back to the hospital for treatment as an out-patient. She was asked to exercise her left arm and right leg.

E She underwent this outpatient treatment periodically on 17 occasions over a period of more than 3½ months until the end of January, 1977 when she ceased to be treated as an outpatient.

G On September 30, 1983 some 6 years and 8 months later, the plaintiff was seen and examined by Dr. Chong. Evidence was led of the result of the examination and of the *sequelae* of the injuries sustained by the plaintiff. However, before I touch on this, I think it is necessary that I should first deal with and dispose of two other matters which were introduced into the evidence of Dr. Chong and which Mr. Ting for the plaintiff in his submission asks the Court to include in the assessment of damages. The first matter relates to a healed fracture of the tip of the right transverse process of the 5th lumbar vertebra, and the second relates to healed fractures of the right os pubis and inferior ramus of the right pubis and separation of symphysis pubis (hereinafter referred to as "the pelvic injuries"). These injuries were discovered from X-ray examination by Dr. Chong on September 30, 1983. Miss Phang for the defendant submits that the Court should not consider or entertain the

plaintiff's claim for damages for these injuries on the ground that they are not pleaded by the plaintiff and that, even if the plaintiff's pleading were allowed to be amended to include them, they are not shown to have been caused by the said road accident. Consequent upon this submission, Mr. Ting applies for and obtains leave of the Court to amend the Statement of Claim to include a claim for damages for the pelvic injuries, but no application is made for amendment with respect to the other injury. The question which I have to decide now is whether I should include these additional injuries in considering the assessment of damages, or put it another way, whether the plaintiff is entitled to damages for these additional injuries in the circumstances of this particular case. In my view, in a running down action where negligence is proved or admitted, a plaintiff is entitled to be awarded damages only in respect of injuries which are pleaded and which are proved, or admitted, to have been caused by the negligence of the defendant. In the present case, the injury to the tip of the right transverse process of the 5th lumbar vertebra is nowhere pleaded in the plaintiff's Statement of Claim. As such, the plaintiff is not entitled to damages for this injury, and evidence adduced herein in proof of such injury will be disregarded as being irrelevant, whatever its probative value, and excluded entirely from my consideration in the assessment of damages. With regard to the pelvic injuries which are pleaded in the Statement of Claim as amended with leave of the Court, they must be proved to have been sustained by the plaintiff as a result of the said road accident to entitle her to damages. The standard of proof required of the plaintiff is one of proof on the balance of probabilities. Dr. Chong testified that from recent assessment he discovered that there were other injuries, namely the pelvic injuries, which were not included in his medical report (Exh. A2), thereby implying that the pelvic injuries were sustained by the plaintiff upon her admission to hospital on August 23, 1976. However, under cross-examination, the doctor stated that it was due to oversight on his part that the pelvic injuries were not stated in the medical report, and that whilst he had no documentary proof that the pelvic injuries were present at the time of the plaintiff's admission, he believed from his experience that the pelvic injuries could have been caused by a force which was responsible for the liver laceration and the fractures of the transverse processes. I think, the cross-examination has virtually reduced the evidence of the doctor to naught insofar as it relates to the pelvic injuries. His explanation for non-inclusion of the pelvic injuries in the medical

A report is totally absurd and his belief as to the cause thereof is merely based on the presupposition that the pelvic injuries existed at the time of the plaintiff's admission. The medical report is dated January 22, 1977 and speaks only of injuries sustained by the plaintiff on her admission to hospital on August 25, 1976 whereas the pelvic injuries were discovered by the doctor only on September 30, 1983. In the light of this, I fail to see how the doctor could validly attribute his omission to state or include the pelvic injuries in the medical report to oversight on his part — he could not possibly have stated or included in the medical report the pelvic injuries which he only discovered 6 years and 8 months later. If the pelvic injuries were not present at the time of admission, then there is nothing to justify his belief that they could have been caused by the same force as that which caused the liver laceration and the fractures of the transverse processes. Thus, considering this evidence as a whole, I am not satisfied on the balance of probabilities that the pelvic injuries were sustained by the plaintiff as a result of the said road accident and I will, therefore, exclude them from consideration in this assessment exercise.

I return now to the result of the examination by Dr. Chong on September 30, 1983. The fracture of the left humerus had united with some angulation and rotation of the upper fragment; there is no sign of any residual injury except that it is clinically deformed and has poor cosmesis in the sense that it does not look nice, and this deformity is not serious to her life nor does it affect her life expectancy. The scalp laceration has also healed well and so have the fracture of the right mandible and the liver laceration. There is a scar of about 5 inches long on the upper mid abdomen which was caused by incision for performing the laparotomy on account of the liver laceration. With regard to the fractures of the transverse processes and compression fractures of 3rd and 4th lumbar vertebrae, these apparently have healed but not without after-effect. According to the doctor, the nerve roots have been affected by these lumbar injuries and as a result, there are changes in the muscle and sensory supply of the right thigh and leg. Clinical examination shows some wasting of the anterior aspect of the right thigh, diminished sensation to pin pricks and light touches on the anterior aspect of the right thigh, diminution in power in the right thigh muscle and decrease in knee jerk reflex. All these clinical findings confirm the damages to the nerve supply of the lumbar vertebrae, with the result that the plaintiff will

have difficulty in running, running upstairs or even dancing. However, the plaintiff's gait is within normal except that on stressing the muscle of the right thigh, there is diminished power.

As regards loss of amenities, I have to confess that I have some difficulty in assessing the extent to which the plaintiff's capacity for enjoyment of life has been damaged by her injuries. Before the accident, she used to, amongst other things, skip, cycle and run. Now, the plaintiff says that apart from having to look after her four-year-old child and doing housework, she still has free time of her own which she spends visiting friends, reading, lying down and planting flowers. There is nothing in the evidence to suggest that her interest in the former activities has, or might have been curtailed by reason of the fact that she has become a housewife with a child to look after; nor is there anything in the evidence to suggest that it has not, or might not have been so curtailed. However, in all fairness, I think the after-effect suffered by her from the lumbar injuries is clear indication that she will have difficulty in indulging herself in the former activities, and thus her capacity for enjoyment of life in respect thereof has to a certain degree been damaged by her lumbar injuries. I think this is a factor which I have to take into consideration when attempting to estimate the quantum of damages for pain and suffering and loss of amenities.

In assessing damages for pain and suffering and loss of amenities, I take into account the matters which I have hereinbefore set forth, and also the fact that the plaintiff was 19 years old at the time of the accident. For the purpose of this exercise, I think it more convenient for me to assess damages for each injury individually and then award a lump sum after taking into account the element of overlapping in the assessment.

For the scalp laceration, Mr. Ting suggests a sum of \$600.00 on the authority of *Zainah binte Abdullah & Ors. v. Lim Liang Hock*⁽¹⁾, which, as pointed out by Miss Phang, is not relevant as it refers to abrasion on the left knee. However, having regard to the fact that the scalp laceration has healed well without any residual effect, I think an award of \$500.00 would be fair and reasonable.

For the fracture of the left humerus, Mr. Ting suggests a figure of \$4,500.00 on the authorities of *Lau Kiu Kwong v. Government of Malaysia & Anor.*⁽²⁾ (unreported) where \$6,500.00 was awarded for a compound fracture in the mid shaft

A of the right humerus and a laceration about 3 inches long on the anterior aspect of the right upper arm, and *Hassan bin Mat Saman v. Tengku Mat @ Engku Mat bin Engku Mik & 3rd Party*,⁽³⁾ where \$6,500.00 was awarded for a 2-inch deep laceration over the right upper arm with exposed fracture (compound fracture) with considerable amount of bleeding and other injuries consisting of an abrasion over the forehead, a few abrasions over the right side of face with a 1-inch abrasion over the bridge of nose and a 2-inch laceration over right elbow. Undoubtedly, these two cases are more serious than the present case, in that the main injury in those cases is one of compound fracture, whereas in the present case the injury appears to be one of simple fracture. Bearing in mind these differences and having regard to the fact that the fracture of the left humerus has healed with no residual effect other than a mild deformity which affects the appearance of the left arm, I am of the view that a sum of \$4,000.00 would be fair and reasonable.

With regard to the fractures of the transverse processes and compression fractures of the 3rd and 4th lumbar vertebrae, Mr. Ting submits a figure of \$25,000.00, relying on the authorities of *Hamzah bin Abdul Ghani v. Verghese Thomas*⁽⁴⁾ and *Appandurai @ Raju s/o Varthan v. Lim Puk Tow*.⁽⁵⁾ In the *Hamzah* case (*supra*) the plaintiff suffered wedge-compression fractures of the 2nd, 3rd and 4th lumbar vertebrae with residual deformities, and general damages were assessed at \$18,000.00. In the *Appandurai* case (*supra*), \$15,000.00 was awarded as general damages for fracture of the transverse process of the 2nd, 3rd and 4th lumbar, severe backache and weakness in the right foot. Although neither of the cases cited above is exactly on all fours with the present case, nevertheless, I think, they are relevant, in that the main injuries involved in either of these cases, namely, fractures of the lumbar vertebrae, are the same as in the present case, notwithstanding that the number of fractures involved is different. In the present case, the plaintiff suffers fractures of the transverse processes and compression fractures of the 3rd and 4th lumbar vertebrae, with some wasting of, and diminished sensation to pain and touch, on the anterior aspect of the right thigh, and diminution in power in the right thigh muscle. Apart from this, she also feels uncomfortable in her back when sitting down. In my view, the residual defects suffered by the plaintiff in the present case are comparable in terms of severity to those suffered by the plaintiff in either the *Hamzah* case or the *Appandurai* case, even though

the plaintiff herein has suffered one fracture less than the plaintiff in either of those cases. Having regard to the above, I think a sum of \$18,000.00 would be fair and reasonable.

For the fracture of the right mandible, Mr. Ting suggests a figure of \$7,500.00 on the authorities of *M. Alagappan, s/o Muthuraman v. The Government of the Republic of Singapore*⁽⁶⁾ (\$7,000.00) and *Yasin bin Wahab v. Loo Kok Wai*⁽⁷⁾. In the case of *M. Alagappan (supra)*, the fracture of the mandible was treated with wire fixation and there was no residual disability as far as the jaw was concerned. In the *Yasin* case (*supra*), the fracture of the mandible had united soundly, but there was a residual disability, in that the plaintiff there suffered discomfort on side to side movement of the mandible. In the present case, it is difficult to determine the seriousness of the fracture of the mandible, owing to the absence of evidence relating to its treatment. From the plaintiff's evidence, it would not be unreasonable to deduce that it took a much shorter period to heal than in the *Yasin* case (*supra*). Although medical evidence shows that the fractured mandible has healed well with no sign of any residual disability, the plaintiff complains that she feels uncomfortable in her mouth when biting solid food. Under the circumstances, I think an assessment of \$6,000.00 would be fair and reasonable.

As regards the liver laceration, a figure of \$6,000.00 is suggested by Mr. Ting on the authority of *Muslim bin Arip v. Gue Kee Peng*.⁽⁸⁾ There is no doubt that this case is more serious than the present case, in that the outer aspect of the right lobe of the liver was pulverised and the damaged portion thereof was removed. In the present case, the liver was lacerated causing bleeding from an artery, but this was sutured at laparotomy. The liver laceration has healed with no side effect, except for the 5" laparotomy scar on the upper mid abdomen, which obviously will not in any way affect the plaintiff's outward appearance. In the light of these factors and having regard to the case of *Siow Choo Foo v. Lee Peng Lay & Anor.*⁽⁹⁾ I am of the view that \$5,000.00 would be a fair and reasonable assessment.

From the above assessment of all these five injuries, a total sum of \$33,500 is arrived at. However, there is, undoubtedly, considerable overlapping in this case, since all these injuries were suffered in the same accident. A sum of \$8,500.00 should therefore be deducted for overlapping, leaving a balance of \$25,000.00 which, I think, is

A fair and reasonable in the circumstances.

Accordingly, judgment is given for the plaintiff in the sum of \$25,000.00 as general damages, with interest at the rate of 6% per annum from the date of the service of the Writ to the date of judgment, and \$92.00 as special damages with interest at the rate of 3% per annum from date of accident to the date hereof, and further statutory interest on general and special damages at the rate of 8% per annum from date of judgment to the date of payment, and costs.

C

Claim allowed.

Solicitors: *Yong & Wong; Battenberg & Talma.*

D

**MANANG SELAMAN AK. NYALAU v.
MANANG LIM NATIVE SDN. BHD.**

[O.C.J. (Chong Yik Liong J.) February 7,
April 4 & 22, June 13 & July 24, 1984]

E

[Kuching – Originating Motion No. KG 16 of 1982]

Land Law – Caveat – Entry and removal – Applicant a non-native – Whether agreement and trust deed valid – Whether interest in land – Whether caveat could be removed – Land Code (Sarawak Cap. 81), ss. 8, 9(1)(d) & 177(1) – Interpretation Ordinance (Sarawak Cap. 1).

In this case, the respondent company, not being a native, lodged a caveat against a piece of land comprised in Kuching Lease of Crown Land No. 5352 of 1952 ("the said land") based on an agreement entered into between the respondent and the applicant and a trust deed executed by the applicant, registered proprietor of the said land. The applicant applied to the Court under section 177(1) of the Land Code (Sarawak Cap. 81) for the removal of the caveat.

Held: (1) on the law as it now stands, there is no way in which the respondent can acquire the status of a native, and being an artificial person, the respondent is not, and can never be, a native within the meaning of the Land Code read in conjunction with the Interpretation Ordinance;

(2) the agreement and the trust deed are illegal as being made in contravention of the provisions of section 8 of the Land Code in that they relate to a dealing prohibited by law, and are therefore void and unenforceable;

(3) the respondent having no valid claim to an interest in the said land, the caveat must be removed, with costs to the applicant.

[*Editorial Note:* The respondent's appeal to the Supreme Court was dismissed in S.C.C.A. No. 210 of 1984. The Supreme Court Judgment will be reported in the next issue.]